APR 4 1972

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1971

No. 71-1268

PAUL BROWN and UNITED STATES TELEPHONE COMPANY,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN CRIMINAL ACTION

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN CRIMINAL ACTION

Petitioners Paul Brown and United States Telephone Company pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming their judgment of conviction after a jury trial in the Southern District of New York under 18 U. S. C. 542, Entry of goods by means of false statements.

Opinions Below

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, *infra*, p. A1. There was no formal opinion by District Judge Lawrence W. Pierce.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit, affirming the judgment of conviction of both appel-

lants, was entered on March 6, 1972. This petition for certiorari was filed less than thirty days from the date aforesaid. The jurisdiction of this writ is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether the reservation of the decision by the Trial Court on the motion pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure for a judgment of acquittal at the end of the Government's case constitutes reversible error, especially where the sufficiency of the evidence was in question.

2. Whether the summation of the prosecutor violated the defendant's right to a fair trial (a) by using the word "lie" on five occasions with reference to the defendant's testimony, and by using the words "the big lie" on one occasion with reference to the defense itself, thus exceeding the reasonable limits of fair comment laid down by this Court in *Berger* v. *United States*, 295 U. S. 78, 88, and (b) by commenting on the defendant's "character" and "integrity", when defendant had introduced no character evidence, thus conflicting directly with the decision of the Court in *Michelson* v. *United States*, 335 U. S. 469, 475.

3. Whether the Trial Court's charge as to reasonable doubt, which the United States Court of Appeals stated was "garbled", was so equivocal, misleading and inconsistent that it violated the defendant's right to a fair trial.

4. The Trial Court, at some unknown time, changed a crucial portion of the Record having to do with reasonable doubt (different from the portion discussed in 3) pursuant to Sec. 10(e) of the Rules of Appellate Procedure. Said change did not conform the Record "to the truth" of

what occurred in the District Court. Does this action by the Court of Appeals in sanctioning so far a departure by the Trial Court from the usual and accepted course of judicial procedure call for an exercise of supervision on the part of this Court.

5. The specific language of the indictment accuses the defendants of "unlawfully, willfully and knowingly" entering merchandise into the United States "by means of false and fraudulent invoices, declarations, affidavits, papers and statements . . .". The statute §542 U. S. C. prohibits entry of merchandise into the United States "by means of any fraudulent or false invoice, declaration, affidavit, paper and statement without reasonable cause to believe the truth of such statement". The Trial Court refused to charge on the following definitions of the necessary elements of the crime: (a) "specific intent"; (b) "fraudulent"; (c) "action on advice of counsel"; and (d) "good faith". Did this failure to charge on essential elements of the crime constitute reversible error.

Constitutional Provisions, Statutes and Rules Involved

This case involves the Fifth Amendment to the Constitution of the United States, 18 U. S. C. 542, 18 U. S. C. 545, 28 U. S. C. 1254(1) and Rules 29(a) and 52(b) of the Federal Rules of Criminal Procedure, and Section 10(c) of the Federal Rules of Appellate Procedure. The texts are printed in the Appendix to this Petition in pp. B1-B4, *infra*.

Statement of Facts

The defendants, Paul Brown, an importer, and the United States Telephone Company, a corporate entity which is his alter ego, engaged in the importation of decorative telephones which were manufactured in Japan.

Investigation of the defendants by a succession of at least six customs agents extended over a long period commencing at the end of 1964. The defendants were indicted March 2, 1971, on one count of conspiracy to violate Sections 542 and 545 of Title 18 of U. S. C., thirty-six counts of smuggling under Sec. 545 of Title 18, and thirty-six counts of false and fraudulent statements under Sec. 542 of Title 18. The first trial, before former Chief Judge Sylvester J. Ryan in the Southern District of New York, for five days commencing May 24, 1971, resulted in an acquittal on the conspiracy charge and, after four days of deliberation, a hung jury on the seventy-two substantive counts.

On June 29, 1971, the case was retried before Judge Lawrence W. Pierce, and prior to the introduction of evidence the government dismissed the thirty-six counts relating to smuggling for "insufficient evidence". On July 2, 1971, with the Fourth of July weekend coming on, within forty-five minutes the jury returned a verdict of guilty after hearing what amounted to more than seven hundred eighty pages of testimony in transcript, which involved letters of credit, evaluating debit notes, commercial invoices and customs invoices.

The Government's case was based upon the discrepancy it claimed existed between documents presented to customs for entry purposes and the documents presented to a bank for purposes of financing under the letter of credit. It proceeded on the theory that by demonstrating that for the same shipment, the invoice which was presented to customs had a lesser purchase price than the purchase price on the document presented to the commercial bank handling the letter of credit, it could prove beyond a reasonable doubt that the provisions of Sec. 542 were violated. The defendant's position throughout the trial, since "value" and not "price" is the deter-

mining factor in assessing customs duty, as admitted by the prosecution, was that the documents presented to customs represented the true value of the goods and that the documents relating to the same shipment for the commercial bank for the letter of credit financing included not only the purchase price, but also sums not related to value, not dutiable and with no identity to the customs invoice.

Of the Government's three witnesses, Assessor for the Bureau of Customs John G. O'Brien testified on cross-examination that this item was a new one under the tariff regulations, that his interpretation of the tariff law which determined the value of the item could have been wrong, that such items are referred to the Customs Court for determination and that that Court sometimes ruled against the Bureau. Mr. Solomon Chamama, a former employee of the United States Telephone Company, stated on cross-examination that the customs invoice and the invoice used for the bank for purposes of letter of credit financing served "two distinct and separate purposes". Chamama also stated that various sums of money raised by the letter of credit went to pay extraneous expenses such as factoring costs. Anthony Ferriola, of W. C. Byrnes & Co., the customs broker for United States Telephone Company, admitted on cross-examination that at times customs changed its policy on what is dutiable or not, and that documents pertaining to letters of credit are not submitted to customs.

At the close of the Government's case, the defendants moved for a judgment of acquittal and the Court reserved decision and directed counsel to "proceed". The defendant was the only one with the requisite knowledge capable of testifying, and so he was forced to do so without the motion being decided.

The defendant testified as to expenses which are not dutiable and which in fact were paid for through financing by means of the letter of credit, such as engineering, lawyer's and accountant's fees, salaries for employees abroad, rent, factoring charges, financing costs, warehousing for merchandise in stock, advance deposits for the factor, defective items, tooling costs for items never used. He moreover stated that he had consulted three firms of attorneys who specialize in customs law: Barnes, Richardson and Colburn; Cladd and Tuttle; and Segal, Mandel and Davison. He testified that from 1965 up until the indictment, none of these firms, who were fully cognizant of his method of operation, ever informed him that what he was doing was in violation of customs rules or regulations. He further testified that in an identical matter in California, the U. S. District Director of Customs there decided that it be treated as a civil matter. He also testified that no agent at any time informed him of any possible criminal violations. On the contrary, in 1968, when Agent O'Brien finally advised the defendants to change their method of stating value based on a determination which the Bureau made, the defendants complied fully with the regulation and since have done so. All of this testimony was presented in order to show the defendant's state of mind vis a vis "fraudulent" and to demonstrate the basis for his "good faith" and "action on advice of counsel".

At the close of the defendant's case, the Government called a rebuttal witness, Edward J. Walsh, Special Agent of the Bureau of Customs, who also testified on cross-examination that he was not infallible, that his interpretation of the tariff laws could be wrong and that that is why there is a U. S. Customs Court. The defendants again moved for a judgment of acquittal and decision was reserved.

During the summation of the prosecution, defendant's counsel objected and was told by the Court "not to interrupt", and although defense counsel rose to object at a later time, he was waved down by the Court. In chambers, defense counsel objected to the prosecutor's frequent use of the word "lie" and the direct reference as to "the character" of the defendant, stating that such comments went beyond fair comment and legal propriety and were designed to prejudice the jury.

In chambers, prior to his charge, the Judge advised counsel he refused to charge Request No. 9, "Good Faith", Request No. 10, "Action on Advice of Counsel", Request No. 12, "Specific Intent" and Request No. 15, "Fraudulent". At the conclusion of the Judge's charge, defendant's counsel renewed his requests to charge on the above and they were again denied. (Former Chief Judge Sylvester J. Ryan did so charge on the first trial.) The jury returned a verdict of guilty and a motion was made to set aside the verdict and decision was reserved.

On September 30, 1971, Judge Lawrence W. Pierce, after denying all motions, sentenced the defendants. On February 24, 1972, in the argument on appeal before the United States Court of Appeals for the Second Circuit, defense counsel was informed for the first time that a certain portion of the Court's transcript relating to the charge on reasonable doubt did not conform to defense counsel's or Government counsel's portion, which were identical with one another. On March 6, 1972, judgment of conviction was affirmed.*

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*On March 22, 1972, after the preparation of this writ, on a motion for reduction of sentence, Judge Lawrence W. Pierce reduced the fine of the defendant Paul Brown from $1,000. per count to $350. per count, and suspended the execution of the prison sentence previously imposed.

Reasons for Granting the Writ

Arguments on Question I:

The growing conflict between circuits necessitates that this Court resolve the problem which has arisen over the plain language of Rule 29(a) of the Federal Rules of Criminal Procedure. The rule, which is self-explanatory, makes it mandatory for the Trial Court to rule in every instance at the close of the Government's case (2 Wright, Federal Practice and Procedure (1969) Sec. 463 p. 245.) This rule is being breached more than observed.

In this instance, the Court of Appeals of the Second Circuit said:

> "It is settled in this Circuit that if the trial judge erroneously reserves decision . . . a defendant by proceeding to introduce evidence in his own defense (as appellants did here), waives the right to review the adequacy of the government's case . . .".

The Appellate Court cited *McGautha* v. *California*, 402 U. S. 183 215-16 (1971), not that said case supported its holding here, but that, since this Court in *McGautha* left the question open, citing the different views of various circuits, the Appellate Court here was free to choose either one of the two diametrically opposed sides.

The failure of a District Court to rule on such a meaningful motion is more than a mere inconsequential omission, it is a callous disregard of the rule itself. The current practice of Circuit Courts in condoning said practice as if it were procedurally insignificant has subverted the laudatory purpose, simple intent and effective form of the provision.

In *Cephus* v. *United States*, 324 F. 2d 893 (D. C. Cir. 1963), the Court stated at page 897: "But Rule 29(a) of the Federal Rules of Criminal Procedure makes it clear

that the first ruling is not discretionary in criminal cases." The effect of the relaxation of scrutiny on the rule is to allow the government in criminal cases to present weak and ill-prepared cases, initially lacking essential elements of proof, and then to wait for the defendant to take the stand to testify. As *Cephus* says, "The Trial Court has no discretion to reserve his ruling in the expectation that the defendant will testify." The expected effect of prodding the defendant forward is obvious, especially in this case, where only the defendant Paul Brown had the requisite knowledge to establish his defense through testimony. Once he took the stand, the government was free to call upon rebuttal witnesses, as was done here. The positioning of the witnesses and their being called after the defendant had testified gave the government two opportunities to present the government's case. To avoid this piecemeal presentation of government evidence was one of the reasons for the rule. Knowledge that failure to pass on this ruling is reversible error, will caution the prosecutor to present the *quantum* of evidence required on the government's direct case, and will direct the Trial Judge to shoulder a meaningful judicial function in the trial of a criminal case.

In this case based on Title 18 of the U. S. C., Section 542, "Entry of goods by means of false statements", the government relied exclusively upon the discrepancy in price between a commercial invoice for customs and a commercial invoice for a bank for purposes of a letter of credit. Testimony of the government witnesses evidenced this difference, which was not in dispute. But most significantly, these same government witnesses testified on cross-examination that their interpretations of the tariff laws as to value, which determine duty and therefore price, were not infallible, and that the United States Customs Court resolves these honest disputes civilly.

There was an obvious lacuna in the government's case: no proof that the documents as presented to customs were

false and fraudulent—merely that they were different from other documents which served a separate and distinct purpose. The fact that the Court reserved decision on the motion was a silent indication that the government had failed to introduce sufficient evidence. The "*false*" and "*fraudulent*" elements required by the criminal statute were nowhere conclusively shown in the government's case before the motion was made. As the Court stated in *Montoya* v. *U. S.*, 402 F. 2d 847, 850 (5th Cir. 1968), "There is ample cause for suspicion and conjecture in this case, but suspicion and conjecture are not sufficient to sustain a conviction . . .". The inherent difficulty in completely reconstituting the record for appellate purposes, as it stands at the time of the motion under Rule 29(a), is clearly stated by the Court in *United States* v. *Melillo*, 275 F. Supp. 314, 320 (1967):

> "The Trial Judge, having just head the case, and observed the witnesses and the jury is in a better position than an appellate Court to rule on a motion for acquittal."

It is essential that this Court definitely regulate the procedure to be followed by mandating a ruling by the Trial Courts under 29(a) of the Federal Rules of Criminal Procedure. For, as the Court said in the *Melillo* case at 318, "Effective exercise of the power to grant a judgment of acquittal furnishes defendants with necessary protection against conviction on inadequate proof. Since penalties are more severe in criminal than in civil cases and a greater probability of accuracy in findings of fact is demanded, more stringent control by the trial judge is warranted."

By reestablishing the necessity of a ruling in all instances in which there has been a failure to present sufficient evidence as provided by Rule 29(a), the Supreme Court will animate the rule, resolve the conflict in inter-

pretation between the circuits, promote the orderly presentation of evidence by the government in criminal cases, and revitalize the function of the trial judge. By passing on the sufficiency of the evidence actually presented by the government in this important and unique customs matter, the Court will impose on this area the norms and safeguards which it has assiduously extended to other areas of the law where false and fraudulent intention are prerequisite proofs.

Arguments on Question II:

The special status occupied by the representative of the government at a criminal trial and the *caveat* as to his conduct at the trial are carefully set forth by the Supreme Court in *Berger* v. *U. S.*, 295 U. S. 78, 88 (1935).

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

What then were the foul blows which it is alleged were used here by the United States Attorney. The remarks personalizing the defendant were: "Let's look at some of the lies he told on the witness stand" (Tr. 719); "The

one man with the biggest motive to lie . . . Brown" (Tr. 725); "Possibly it is understandable in a situation like Brown's to lie on the witness stand . . . but you shouldn't condone it" (Tr. 719); "No one who took the witness stand has a bigger motive than Brown to lie" (Tr. 725); "another lie" (Tr. 723), and finally the remarks evaluating the defense itself were "The defense has practiced what is commonly known as the big lie" (Tr. 726); "all that nonsense . . . all that junk was raised to try to confuse you . . ." (Tr. 700). There is ample authority that such statements are improper. *Stewart* v. *United States*, 247 F. 2d 42, 46 (D. C. Cir. 1957); *Harris* v. *United States*, 402 F. 2d 656 (D. C. Cir. 1968). Thus in *Greenberg* v. *United States*, 280 F. 2d 472, 474, 475 (1st Cir. 1960), the Court said in referring to the Assistant United States Attorney, "to permit counsel to express his personal belief on the testimony (even if not phrased so as to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate as one of them has the advantage of official backing." See also *Dunn* v. *United States*, 307 F. 2d 883 (5th Cir. 1962); *United States* v. *Jones*, 433 F. 2d 1107, 1108 fn. 5, "counsel are not to interject their opinions concerning the veracity of witnesses."

As Chief Justice Burger, then Circuit Judge, said in *Taylor* v. *United States*, 413 F. 2d 1095 (D. C. Cir. 1969),

> "The test of reversal is not the only test of appropriate conduct . . . Perhaps under the pressures of inordinately heavy criminal calendars which place all the participants under strain we have all become too tolerant of violations of canons and customs; hence our observations are not intended to condemn but to guide future conduct."

Regarding the statements as to the defendant's character and integrity: "Did you really need any more witnesses to get a measure of what Mr. Brown's ability to tell the truth really is, to get an insight into his character and into his integrity" (Tr. 724) and "They should have educated him as to a sense of honesty and integrity that he doesn't possess" (Tr. 731) clearly contravene the established rule in *Michelson v. United States*, 335 U. S. 469, 475 (1948), that no statements as to character are admissible unless the defendant places character in issue. This was not the case here; yet the United States Attorney volunteered his estimate as to the character of the defendant.

The cumulative effect of all these improper remarks was to convince the jury of the guilt of the defendant upon the ready-made characterization of the prosecutor. In allowing such a cumulative collection of errors to stand, the Court of Appeals is sanctioning a breakdown in the standards of the forum and is in conflict with the other circuits. This deterioration will result in irreparable damage to the fair trial guarantees of the Constitution.

Arguments on Question III:

The first disjunctive portion of the Trial Court's charge on reasonable doubt reads in toto as follows:

> "If, after a fair and impartial consideration of all the evidence, you can candidly and honestly say that you are not satisfied of the guilt of the defendants, and that you do not have an abiding conviction of the defendants' guilt, such a conviction as you would be willing to act upon *even hesitatingly* in importance and weighty matters in the personal affairs of your own life, then you have a reasonable doubt, and in that circumstance, it is your duty to acquit." (Emphasis supplied.)

In its decision, and in reviewing this charge, the Court of Appeals stated the following:

> "Although one or two lines of the trial judge's instructions as to reasonable doubt appear to be garbled ('Such a conviction as you would be willing to act upon even hesitatingly in important and weighty matters of the personal affairs of your own life. . . .'), the instruction as a whole, while longer than that usually given on the subject, fairly and accurately stated the principles by which the jury should be governed."

It is apparent that the Trial Court's charge on reasonable doubt, by any objective analysis, states the reverse of what it should in fact say. It defines "abiding conviction of guilt" as being that type of conviction that you would be willing to act upon "even hesitatingly". The "even hesitatingly" should obviously have read "unhesitatingly" for the definition to make sense. Thus the Trial Court had reversed the very simple definition on reasonable doubt recommended by the Second Circuit in *United States v. Acarino*, 408 F. 2d 512, 517 (2d Cir. 1969):

> "A reasonable doubt is not a vague, speculative imaginative doubt, but such a doubt as would cause prudent men *to hesitate* before acting in matters of importance to themselves." (Emphasis supplied.)

Subsequent correct instructions could not remedy the situation. *Smith v. United States*, 230 F. 2d 935, 939 (5th Cir. 1956) states: "The fact that one instruction is correct does not cure the error in giving another that is inconsistent with it."

Moreover, the definition as given is so misleading and equivocal as to be completely unintelligible to any lay-

man. As the Court of Appeals stated in *United States* v. *Guglielmini*, 384 F. 2d 602, 607 (2d Cir. 1967):

> "It may well be that appellate courts have come to place too much reliance on the use of certain words in instructing juries about reasonable doubt. But we do not know how experienced and sophisticated each of the jurors may be in these matters; and we can never know just what words or thoughts are remembered and become the guides which weigh most heavily in the jury's deliberations."

In *Perez* v. *United States*, 297 F. 2d 12, 16, the Court stated:

> "It is also fundamental to our jurisprudence that instructions to the jury must be consistent with each other and not misleading to the jurors."

This charge as given, since it affects substantial rights, comes within the plain error rule set down in the *Smith* case (*supra*) and in Federal Rules of Criminal Procedure 52(b), *Beardon* v. *United States*, 403 F. 2d 782, 786, 787 (5th Cir. 1968) cert. denied, 393 U. S. 1111. To avoid a miscarriage of justice, in *Isaac* v. *U. S.*, 284 F. 2d 168, 171, (D. C. Cir. 1960), the Court stated that where two conflicting views of a principle of law are given, one erroneous and one correct, "we cannot speculate that the correct statements obliterated in the minds of the jurors the erroneous statements." The prejudicial error discussed above must be read in conjunction with the succeeding argument.

Arguments on Question IV:

There were two disjunctive paragraphs on the definition of reasonable doubt. Both contained error. The first disjunctive paragraph was printed and discussed in Ques-

tion III, *supra*. It is reprinted here for purposes of clarity. Both paragraphs as they originally read in the transcript before correction were as follows (Tr. 757):

1. "If, after a fair and impartial consideration of all the evidence, you can candidly and honestly say that you are not satisfied of the guilt of the defendants, and that you do not have an abiding conviction of the defendants' guilt, such a conviction as you would be willing to act upon *even hesitatingly* in importance and weighty matters in the personal affairs of your own life, then you have a reasonable doubt, and in that circumstance it is your duty to acquit." (Emphasis supplied.)

2. "On the other hand, if, after such a fair and impartial consideration of all of the evidence, you can candidly and honestly say that you are satisfied of the guilt of the defendants, that you do have an abiding conviction of the defendants' guilt, such a conviction as you would be willing to act upon even *hesitatingly* in importance and weighty matters of the personal affairs of your own life, then you have no reasonable doubt, and in that circumstance, it is your duty to convict." (Emphasis supplied.)

The error contained in Paragraph 1 has been discussed in the argument in Question III. As to the second disjunctive paragraph, when counsel appeared before the Court of Appeals, he stressed the error contained in this paragraph (Paragraph 2, *supra*). The Court informed counsel that its version of the second paragraph in transcript in fact read differently from both defense counsel's version and that of the United States Attorney. The Court's version as to the first paragraph was identical to that of defense counsel and the United States Attorney. As to the second disjunctive paragraph, the Court's version read as follows:

> "On the other hand, if, after such a fair and impartial consideration of all of the evidence, you can candidly and honestly say that you are satisfied of the guilt of the defendants, that you do have an abiding conviction of the defendants' guilt, such a conviction as you would be willing to act upon *unhesitatingly* in important and weighty matters of the personal affairs of your own life, then you have no reasonable doubt, and in that circumstance, it is your duty to convict." (Emphasis supplied.)

At some time after the trial and before the day of the argument of the appeal, there had been a change in the original words "even hesitatingly" to "unhesitatingly" in Paragraph 2, but there had been no corresponding change in Paragraph 1. Thus, the argument taken on the appeal to the definition in Paragraph 2, which erroneously stated the jury should convict the defendant even if it would hesitate to act upon its conviction, unfairly became academic. This change was obviously made pursuant to Rule 10(e) of the Rules of Appellate Procedure, but it did not in fact "conform to the truth" of what occurred in the District Court according to said rule. The reporter's transcript was clear, and an examination of the Court's copy after appeal clearly evidenced an erasure of the words "even hesitatingly" and a substitution of the word "unhesitatingly". The recollection of the two counsel for the defendants was that the words "even hesitatingly" were used at trial. The United States Attorney did not deny that the Trial Court could have said this.

The parallel construction of these two paragraphs clearly and categorically points to the words "even hesitatingly" being used in both. The paragraphs are identical in format except for this sudden change in this one

word which creates a complete change of meaning. The Trial Court made no corresponding change in Paragraph 1 and thus this is still erroneous. An examination of the transcript showed the letters "un" with a question mark (?) in pencil in the margin alongside the words "even hesitatingly" in Paragraph 1. The Trial Court, in making such a correction in Paragraph 2, patently failed to conform the record to the truth of what occurred. The Appellate Court should have considered this crucial problem which affected substantial rights under the principles laid down by the Supreme Court in *Bollenbach v. United States* (326 U. S. 607, 613):

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue. And a charge deemed erroneous by three circuit judges of long experience and who have a sturdy view of criminal justice is certainly not better than equivocal."

There has been a clear violation of the defendants' constitutional privilege of a fair trial. The Supreme Court should exercise its power of supervision in seeing that this particular section of the Federal Rules of Appellate Procedure is used and not abused.

Arguments on Question V:

The principles of law applied by the District Court and sanctioned by the Court of Appeals of the Second Circuit are contrary to rather than in accord with the law as enunciated by this Court and other circuits. The Court of Appeals of the Second Circuit has persisted in applying its own views as to governing methods, despite the wide gap which has been shown to exist between its views and the views of this Court. In these legal areas, the Court of Appeals of the Second Circuit has repeatedly manifested a propensity to differ rather than defer.

It has long been established that failure to charge on essential elements of a crime constitutes reversible error. 2 Wright, Federal Practice and Procedure (1969) Sec. 487, p. 300. As to the refusal to charge the definitions of "Specific Intent" and "Fraudulent", the Court of Appeals in its opinion stated "that the elements of the crime and the necessity for proving fraudulent intent were adequately defined" and "that the elements of the crime, including the existence of fraudulent intent, had been established beyond a reasonable doubt."

It is as yet undecided by this Court whether specific intent is an element of Section 542 of Title 18, U. S. C. But since the Circuit Court of Appeals has stated the necessity for proving fraudulent intent under the statute, it is submitted that specific intent is an element that should have been charged by the Trial Court. How else then could the prosecutor in his summation have likened customs declarations to income tax returns? Since foreign trade is what is regulated by this statute, the Supreme Court should pass on the essential elements of its provisions, for this statute is in ever more frequent use.

The statute reads "false or fraudulent"; the indictment reads "false and fraudulent". The government had an election but chose to indict the defendants by accusing them of both "false and fraudulent". The defendant consequently had the right that a charge be given on the term "fraudulent" as there was a charge on the term "false". This charge was refused even though this was another essential element of the crime charged by way of the indictment.

Now as to the refusal to charge on "action on advice of counsel" and "good faith": According to La Buy, Jury Instructions in Federal Criminal Cases, 1.01, P. 2, the essential elements of the crime concerning which the

Trial Court must charge include any affirmative defenses. *Griego* v. *United States*, 298 F. 2d 845, 849 (10th Cir. 1962). As stated in the facts of the case above, evidence was introduced by the defendant that over a six-year period he had retained three firms of customs experts, two in New York, one in California, that they were fully cognizant of the facts, that they dealt with the customs officials, but that they never advised him of any rules or regulations of customs that he was violating. Yet the request to charge on "action on advice of counsel" was denied by the Trial Court, although in the first trial it was granted by former Chief Judge Ryan. It was reversible error to take away this affirmative defense by refusing to so charge. In *Burstein* v. *United States*, 395 F. 2d 976, 981 (5th Cir. 1968), the Court stated:

> "Thus if the jury believed that if the appellant honestly relied on the advice of his tax counsel Goldworn, it might be found that the element of willfulness was lacking and have acquitted. Moreover, there is no doubt that there is adequate basis in the record for this instruction."

In the case of *United States* v. *Musgrave*, 444 F. 2d 755, 765 (5th Cir. 1971) which involved the prosecution of a Chairman of a Savings and Loan Association for the preparation and submission of false and fraudulent reports of valuation, the Court held that the defendant was entitled to the "advice of counsel" instruction.

This instruction is appropriate in the type of case in which willful action is an essential element and legal problems are present, as is the case here, 1 Devitt and Blackmar, Federal Jury Practice and Instruction §16.15 P. 314, for the indictment reads "willfully" and the tariff laws present intricate legal problems.

As to the failure to charge on good faith, the *Musgrave* case *supra* at p. 765 stated:

> "Even if the evidence to support the defense was 'fragile' Strauss v. United States supra 376 F. 2d at 419, or 'weak, insufficient, inconsistent or of doubtful credibility' Tatum v. United States, 1950, 88 U. S. App. D. C. 386, 190 F. 2d 612, 617, accord Strauss v. United States supra 376 F. 2d at 419, it was error to refuse to give to the jury the substance of . . . [the] instruction . . ."

The good faith of the defendant should have been considered as a factor in determining whether his conduct was wilfull. *U. S. v. Murdock*, 290 U. S. 389. Also in point is *Perez v. United States*, 297 F. 2d 12, 16 (5th Cir. 1961):

> "The charge to which he is entitled, upon proper request, in such circumstances is one which precisely and specifically, rather than merely generally or abstractly, points to his theory of defense. Cf. United States v. Indiana Trailer Corp. 226 F. 2d 595, 588 (7th Cir. 1955). Apel v. United States, 247 F. 2d 277 (8th Cir. 1951) and one which does not unduly emphasize the theory of the prosecution thereby deemphasize proportionately the defendant's theory."

Failure to charge on these four essential elements of the crime, all of which were requested by counsel both before and after the charge, constituted fatal errors which denied defendants a fair trial. The Court of Appeals should not have sanctioned these grave errors.

CONCLUSION

For all the reasons set forth above, it is respectfully submitted that in the interests of the right to a fair trial, and in light of the overriding issues which are presented here, this Petition for Writ of Certiorari should be granted, especially since the affirmance below is palpably erroneous and untenable.

Respectfully submitted,

PAUL P. RAO, JR.,
Attorney for Petitioners, Paul Brown and United States Telephone Company.

APPENDIX A

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 541, 542 September Term 1971

Argued: February 24, 1972 Decided: March 6, 1972

Docket Nos. 71-2056, 71-2134

UNITED STATES OF AMERICA,

Appellee,

against

PAUL BROWN and UNITED STATES TELEPHONE COMPANY,

Appellants.

Before Lumbard, Mansfield and Mulligan, *Circuit Judges.*

PER CURIAM:

Paul Brown and the United States Telephone Company, which he owns ~~and~~ operates, have each been convicted after trial before a jury of 36 counts of entering goods into the United States by means of false statements between March, 1966 and the end of August, 1968, in violation of 18 U. S. C. §§542 and 2. We affirm.

At the close of the government's case-in-chief appellants moved for judgment of acquittal pursuant to F. R. Cr. P. 29(a). Although a ruling upon such a motion is mandatory,[1]

[1] The rule provides that the trial court "*shall* order the entry of judgment of acquittal . . . if the evidence is insufficient to sustain a conviction. . . ." F. R. Cr. P. 29(a) (emphasis supplied). See 2 C. Wright, Federal Practice and Procedure §462 at 245 (1969).

the trial judge reserved decision. However, neither appellant objected to his action and they proceeded to introduce evidence in their defense. Later their motions for judgment of acquittal were renewed and denied.

Appellants now contend that the trial judge's failure to rule upon their motion at the end of the government's case was reversible error and urge that since the government's case-in-chief was insufficient, entry of judgment of acquittal should be directed. We disagree. The better practice of course is for the trial judge to rule promptly upon such a motion so that the defendant may decide whether or not to proceed with the introduction of evidence in his defense. However, it is settled in this Circuit that if the trial judge erroneously reserves decision on a motion for judgment of acquittal made at the close of the government's case, a defendant, by proceeding to introduce evidence in his own defense (as appellants did here), waives the right to review of the adequacy of the government's case, "at least in the absence of a demand for a ruling on the motion and explicit refusal by the judge to obey the mandate of the Rule." *United States* v. *Rosengarten*, 357 F. 2d 263, 266 (2d Cir. 1966). Contra, *Sullivan* v. *United States*, 414 F. 2d 714, 715 (9th Cir. 1969). Absent such a demand the situation is treated as if the court had denied the motion. Upon such a denial a defendant

> "must decide whether to stand on his motion or put on a defense, with the risk that in doing so he will bolster the Government case enough for it to support a verdict of guilty." *McGautha* v. *California*, 402 U. S. 183, 215-16 (1971).[2]

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[2] Accord, *United States* v. *Calderon*, 348 U. S. 160, 164 n. 1 (1954); *United States* v. *Prionas*, 438 F. 2d 1049, 1054 (8th Cir.), *cert. denied*, 402 U. S. 977 (1971). Contra, *United States* v. *Sutton*, 426 F. 2d 1202, 1211 n. 67 (D. C. Cir. 1969); *United States* v. *Rizzo*, 416 F. 2d 734, 736 n. 3 (7th Cir. 1969).

In any event the government's case was sufficient to support a conviction even without help from evidence later offered by appellants. The evidence introduced by the government established that on the 36 occasions specified in the indictment appellants used two sets of invoices for each shipment imported by them into the United States, one showing the actual purchase price paid to the seller (which was never shown to United States Customs) and the other bearing a false lower price which was presented to Customs and used as a basis for determining the duties to be paid. In each set presented to Customs there was a special customs invoice which falsely stated that "there is no other invoice" covering the shipment. The testimony of witnesses offered by the government revealed that in addition to obtaining two separate sets of invoices from the foreign manufacturer for each of the shipments, Brown instructed a clerical employee of United States Telephone, who had the duty of preparing the necessary Customs papers, not to send the invoices and papers reflecting the higher price to Customs. An employee of a customs broker which handled all but four of the shipments testified that he had been provided only with invoices reflecting the lower price to be given to Customs, and that he had no knowledge of the invoices bearing the higher price and that the usual custom in the brokerage business was that when there were two sets of invoices with different prices covering the same shipment, both are submitted to Customs personnel for decision as to the proper value for duty purposes. The evidence taken as a whole was more than adequate to permit a jury to find that the elements of the alleged crimes, including the existence of fraudulent intent, had been established beyond a reasonable doubt.

We find no merit in any of the other contentions advanced by appellants. Appellants were not improperly

curtailed by the trial judge, who has wide discretion in the area, from examining witnesses on the issue of appellants' intention. The government's summation was well within permissible bounds of propriety. A prosecutor is not precluded from making a forceful and vigorous argument based upon the evidence of record, which was the case here. Indeed this is his function in such an adversarial proceeding. We find no prejudicial expression of personal opinions or views based on evidence outside of the record.

Although one or two lines of the trial judge's instruction as to reasonable doubt appear to be garbled ("Such a conviction as you would be willing to act upon even hesitatingly in important and weighty matters of the personal affairs of your own life . . ."), the instruction as a whole, while longer than that usually given on the subject, fairly and accurately stated the principles by which the jury should be governed. Similarly the elements of the crime and the necessity for proving fraudulent intent were adequately defined, the court pointing out that the government must establish use of a false or fraudulent invoice and defining the term "knowingly" to exclude the possibility of a conviction based upon mistake or inadvertent use of such invoices.

The judgments of conviction are affirmed as to both appellants.

I concur
J E L
March 6 1972

I concur
3 6 72
W H M

Judgment of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of March one thousand nine hundred and seventy-two.

Present:

HON. J. EDWARD LUMBARD,
HON. WALTER R. MANSFIELD,
HON. WILLIAM H. MULLIGAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PAUL BROWN and UNITED STATES TELEPHONE CO.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders and judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

Filed March 6, 1972
United States Court of Appeals
Second Circuit

APPENDIX B

Statutes

Fifth Amendment to the Constitution of the United States:

AMENDMENT 5

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without compensation.

18 U. S. C. 542

§542. Entry of goods by means of false statements

Whoever enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance, or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statements as to any matter material thereto without reasonable cause to believe the truth of such statement, whether or not the United States shall or may be deprived of any lawful duties; or

Appendix B

Whoever is guilty of any willful act or omission whereby the United States shall or may be deprived of any lawful duties accruing upon merchandise embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission—

Shall be fined for each offense not more than $5,000 or imprisoned not more than two years, or both.

Nothing in this section shall be construed to relieve imported merchandise from forfeiture under other provisions of law.

The term "commerce of the United States", as used in this section, shall not include commerce with the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam. As amended June 30, 1955, c. 258, §2(c), 69 Stat. 242.

18 U. S. C. 545

§545. Smuggling goods into the United States

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

The term "United States", as used in this section, shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam. As amended Aug. 24, 1954, c. 890, §1, 68 Stat. 782; Sept. 1, 1954, c. 1213, Title V, §507, 68 Stat. 1141; June 30, 1955, c. 258, §2(c), 69 Stat. 242.

28 U. S. C. §1254(1)

"Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Federal Rules of Criminal Procedure

Rule 29

MOTION FOR JUDGMENT OF ACQUITTAL

(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on

motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

Rule 52(b)

Harmless Error and Plain Error

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Federal Rules of Appellate Procedure

Section 10(e)

(e) Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.